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CASE NO. 84-623

# In The
# Supreme Court of the United States

**OCTOBER TERM, 1984**

**CINCINNATI BELL TELEPHONE COMPANY,**
*Appellant,*

**v.**

**THE PUBLIC UTILITIES COMMISSION OF OHIO,**
*Appellee.*

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**ON APPEAL FROM**
**THE SUPREME COURT OF OHIO**

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## MOTION OF APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO, TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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## STATEMENT OF THE CASE

Appellant, the Cincinnati Bell Telephone Company (hereinafter Appellant, Cincinnati Bell or CBT) has set forth a simplified statement of the case disregarding many significant occurrences below.

By its application in Case No. 81-1338-TP-AIR, CBT sought the authority from the Public Utilities Commission of Ohio (hereinafter Appellee, Commission or PUCO) to increase rates for intrastate telecommunications services provided solely within the state of Ohio. At the time CBT filed its application, it sought the use of remaining life and equal life group depreciation accrual rates, similar to the rates approved by the Federal Communications Commission (hereinafter FCC) for CBT.

While CBT's application was pending before the Ohio Commission the FCC found that "the *First Report and Order* does not preclude state commissions from using other accounting or depreciation procedures for intrastate ratemaking."[1] *Re Amendment of Part 31, Uniform System of Accounts For Class A and Class B Telephone Companies,* 89 FCC 2d 1094, 1095 (April 27, 1982). The FCC specifically held that it did not have the authority to preempt state regulation of depreciation rates for intrastate purposes. *Id.* at 1107.

After all evidence and briefs were submitted and the record was closed in Case No. 81-1338-TP-AIR, the FCC, in a subsequent opinion, dated January 6, 1983, reversed itself, finding that states were preempted from using inconsistent depreciation methodologies. *Re Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* 92 FCC 2d 864 (1983).[2]

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[1]The *First Report and Order* of the FCC, commonly known as "Expensing of Station Connections", adopted a number of changes in Part 31 of the FCC's Rules, Uniform System of Accounts For Class A and B Telephone Companies. The primary change required the expensing of station connections (inside wiring) costs.

[2]An appeal was taken from the FCC's opinion to the Fourth Circuit Court of Appeals in *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F. 2d 388 (4th Cir. 1984). The decision rendered by the Fourth Circuit Court of Appeals will be the subject of a petition for review by certiorari some time in the very near future.

The PUCO, consistent with its obligations pursuant to Title 49 of the Ohio Revised Code, established rates for the intrastate services of CBT. While initially, the PUCO did use remaining life, equal life group rates, it subsequently altered the rates on rehearing. At rehearing the Commission specifically found that" [i]n this proceeding, the most reasonable depreciation accrual rates were proposed by the Staff based upon the whole life and ELG methodologies." *Entry on Rehearing,* Case No. 81-1338-TP-AIR (March 9, 1983). Appellant's Appendix at A 25.

CBT took an appeal from the Commission's decision alleging error by the PUCO in choosing not to use remaining life depreciation rates. The Ohio Supreme Court affirmed the Commission's decision, finding *inter alia* that the PUCO was not bound by principles of res judicata to apply the FCC's preemption decision and that the decision by the PUCO was not unreasonable or unlawful within the parameters of Title 49 of the Ohio Revised Code. *Cincinnati Bell Telephone Co. v. Public Utilities Commission,* 12 Ohio St. 3d 280 (1984). It is from that determination that CBT is seeking appellate review by this Court.

## MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1(b), and 16.1(d), Appellee, the Public Utilities Commission of Ohio, hereby moves this Court to dismiss the appeal of the Cincinnati Bell Telephone Company as improperly taken from the Supreme Court of Ohio under 28 U.S.C. §1257(2). In the alternative, the Public Utilities Commission of Ohio moves that this Court affirm the decision of the Supreme Court of Ohio rendered below.

This appeal should not be accepted by the Court. Appellant should have raised below the same questions it is raising in this appeal. It failed to do so. The questions Appellant has raised should constitute substantial federal questions. They do not. The Court should therefore refuse to take jurisdiction of the appeal. In the alternative, this Court should affirm the decision by the Ohio Supreme Court since it properly applied res judicata and state law principles to the issues raised below.

## ARGUMENTS IN SUPPORT OF MOTION TO DISMISS

### A. APPELLANT FAILED TO PROPERLY AND ADEQUATELY PRESENT BELOW THE ISSUES IT NOW RAISES FOR REVIEW.

Appellee, the PUCO, submits that Appellant failed to present in an adequate and timely manner, the questions of which CBT now seeks plenary review by this Court. Absent adequate and timely presentation in the state court of the issues of which Appellant presently seeks review, an appeal will not lie.

Appellant seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1257(2), which provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the . . . laws of the United States and the decision is in favor of its validity.

This Court has previously indicated that the prerequisite to review is the presentation of a federal question in both an

adequate and timely manner. *Webb v. Webb*, 451 U.S. 493 (1981). As the Court stated in *Webb:*

> Because this comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have "specially set up or claimed under the constitution . . . of . . . the United States" that right which he now seeks to have this court enforce. 28 U.S.C. § 1257(3). Similarly our Rule 21.1(h) requires the petitioner to "specify the stage in the proceedings, both in the court of the first instance and in the appellate court, of which the Federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court."

*Id.* at 495.

This Court has continually stated that it "will not decide Federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also Street v. New York*, 394 U.S. 576, 581 (1969); *Webb*, 451 U.S. at 496-97. This Court has consistently reiterated this position, stating in *District of Columbia Court of Appeals v. Feldman:*

> It is possible that review of a state court decision by the Court could be barred by a petitioner's failure to raise his constitutional claims in the state courts. In Cardinale v. Louisiana, . . . we stated that "it was very early established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions."

51 U.S.L.W. 4185, 4291 n. 16 (U.S. March 23, 1983); *see also Exxon Corp. v. Eagerton*, 51 U.S.L.W. 4700 (U.S. June 8, 1983).

Although brought to the Court by a petition for writ of certiorari, *Webb* contains an excellent discussion of the policy reasons underlying the Court's requirement that the issue for which review is sought be adequately and properly presented below. As this Court stated:

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements. As the Court has elsewhere observed, this principle of comity requires
>
> > a proper respect for state functions, a recognition of the fact that the entire country is made up of a union of separate state governments, and a continuance of the belief that the national government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. Younger v. Harris, 401 U.S. 37 (1971).

451 U.S. at 499-500. Such a "rule also insures that if there are independent and adequate grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Id.* at 500.

These requirements will most likely result in "judgments . . . supported by an opinion that may well obviate any reasons for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter." *Id.* at 501. The Court in *Webb* set forth the minimum requirements justifying the finding of jurisdiction:

> At the minimum, however, *there should be no doubt* from the record that a claim under a federal statute or the federal constitution was presented in the state courts and that those courts were

> apprised of the nature or the substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

*Id.* (emphasis added).

The instant appeal is one in which the Court should apply the foregoing standards of review and refuse to accept jurisdiction. Appellant has sought in this appeal to raise the Full Faith and Credit Clause, the Supremacy Clause, and the Full Faith and Credit Statute, 28 U.S.C. § 1738, as support for its premise that both the Ohio Commission and the Ohio Supreme Court should have applied the principles of res judicata to the Fourth Circuit Court of Appeals decision in *Virginia State Corporation Commission v. Federal Communications Commission,* 737 F.2d 388 (4th Cir. 1984). CBT is attempting for the first time to give constitutional stature to its res judicata claim. By so doing, Appellant seeks to avoid the requirement that the issue raised on appeal must have been presented below in an adequate and timely manner.

Appellant raised several issues below, the most prominent being the applicability of the principles of res judicata to the preemption decision of the FCC issued on January 6, 1983. CBT also argued that the FCC preemption decision was correct, based upon CBT's statutory interpretation of the Communications Act.[3] A review of CBT's briefs below clearly demonstrates that the questions CBT now seeks to present

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[3]Appellant suggests that the Ohio Supreme Court should have deferred to the Fourth Circuit Court of Appeals decision in *Virginia State Corporation Commission* under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1. This is the first time that any reference has been made to the Full Faith and Credit Clause in this proceeding. Due to its untimely presentation, this claim should be rejected. CBT's additional reference to articie III of the Constitution should also be given no consideration since it also is just raised for the first time in CBT's Jurisdictional Statement.

were never fully raised and passed upon. The questions presented by CBT in this appeal and the arguments presented below, both on their face and in content, differ substantially.

In its Proposition of Law No. 1 before the Ohio Supreme Court[4], CBT presented the issue as follows:

> When the issue of federal preemption of state prescribed depreciation rates has been decided adversely to the PUCO in an administrative proceeding to which the PUCO was a party, the PUCO is bound by principles of res judicata to give effect to that administrative decision.

Appellee's Appendix at A-8. Subsequent Propositions of Law focused on the correctness of the FCC's ultimate decision and the impossibility of compliance with two different accounting orders, one for interstate equipment and the other for intrastate equipment. Clearly, Appellant argued below that the Ohio Commission and the Ohio Supreme Court were subject to the preemptive effect of the FCC decision standing alone. CBT did not assert below that the Supremacy Clause of the Constitution was applicable to the FCC decision and it, the Supremacy Clause, compelled compliance by the state Commission and court. The arguments presented below focused only on the applicability of res judicata to the FCC preemption decision. They did not, as CBT now insists, focus on the application of the principles of res judicata to the Fourth Circuit Court of Appeals decision in *Virginia State Corporation Commission*.[5] Indeed, as Justice William B. Brown suggested in his dissenting opinion, Cincinnati Bell was well-advised to request reconsideration of the decision by the Ohio Supreme Court "in light of the decision rendered by the federal court." *Cincinnati Bell*, 12 Ohio St. 3d at 292.

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[4]According to Rule 5(1)(D), Ohio Supreme Court Rules of Practice, the Appellant is to set out a proposition of law which could be used as the syllabus for the Court's decision. Ultimately, the syllabus of the Opinion becomes a rule of law. *Smith v. Klem*, 6 Ohio St. 3d 16 (1983).

[5]The Ohio court could not consider the res judicata effect of the decision by the Fourth Circuit Court of Appeals because the Fourth Circuit did not issue its decision until June 1984, well after this case was briefed and argued below.

The Ohio Supreme Court reached only two issues: (1) the res judicata effect, if any, to be given to the FCC's rulemaking decision, and (2) the reasonableness and lawfulness of the Ohio Commission's opinion when viewed in light of the provisions of Ohio law.[6]

The issues presented in CBT's Jurisdictional Statement are substantially different from the arguments presented below. The question of the res judicata effect of the Fourth Circuit decision was never presented below in an adequate and timely manner. The principles of res judicata, by their very nature, require a court to give careful scrutiny to the earlier decision to determine whether there is both an identity of issues and an identity of parties, assuming the existence of an adjudicatory proceeding to which the principles of res judicata would be applicable. *See United States v. Utah Construction and Mining Co.,* 384 U.S. 394 (1966); *Superior's Brand Meats, Inc. v. Lindley,* 62 Ohio St. 2d 133 (1980). *See also Whitehead v. General Telephone Co. of Ohio,* 20 Ohio St. 2d 108 (1969). The issue of the res judicata effect to be given to the Fourth Circuit decision could not even be considered and passed upon by the Ohio Supreme Court. The issue was never clearly and concisely presented to the Ohio court. This Court has previously held, under similar circumstances, that absent a decision by the state court affirmatively addressing the issue, this Court lacks jurisdiction to entertain the appeal. *Exxon Corp. v. Eagerton,* 51 U.S.L.W. at 4701 n. 3.

Appellant's second argument, suggesting that the Supremacy Clause, article VI, para. 2, United States Constitution, required the Commission and the Ohio court to give preemptive effect to the FCC decision was never presented in an adequate and timely manner in the Ohio Supreme Court. The reference to the Supremacy Clause, appearing obliquely only once in CBT's brief below, does not constitute a proper and full

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[6]While the Ohio Supreme Court quoted from the decision in *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* No. LRC-247 (E.D. Ark. March 30, 1984), the Ohio court's decision rests upon state law grounds. Contrary to CBT's assertion, the Ohio court did not address the lawfulness of the FCC's preemption decision. Any reference by the Ohio court to *Southwestern Bell* was simply dicta.

presentation of the issue that justifies this Court's acceptance of jurisdiction. CBT made its brief reference to the Supremacy Clause in its argument in support of the following Proposition of Law:

> When compliance by a telecommunications carrier such as Cincinnati Bell with both FCC-prescribed depreciation rates and PUCO-prescribed depreciation rates is impossible, the PUCO-prescribed depreciation rates are preexempted by those of the FCC.

Appellee's Appendix at p. A-13. In its argument Appellant did note clearly address the application of the Supremacy Clause to this issue, but instead argued that it was impossible for CBT to comply with both the Ohio Commission's order and the FCC's decision.[7] The argument presented below is substantially different from that asserted in Appellant's Jurisdictional Statement. Although dealing with a petition for habeas corpus, *Picard v. Connor,* 404 U.S. 270 (1971), is most instructive on this point, requiring the "prisoner to present the state courts with the same claim he urges upon the federal courts." *Id.* at 276. The record below, according to *Picard,* must give the state court "a fair opportunity" to consider Appellant's constitutional claim. *Id.* Failure to present the substance of the claim should, in accord with *Webb* and *Picard,* result in a denial of jurisdiction. In this case Appellant simply failed to raise the Supremacy Clause issue which it now seeks to present in this appeal.

Appellant, CBT, seeks to present this Court with several questions which were never fully and fairly presented to, nor considered by, the Ohio Supreme Court. Furthermore, the

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[7]It should be noted that even the Fourth Circuit Court of Appeals, when addressing the issue of impossibility in *Virginia State Corporation Commission,* found:

> [T]he instant appeal raises no question of actual physical impossibility of complying with dual federal and state regulation; presumably, the carriers could keep accounts in which assets would be separately depreciated for intrastate purposes.

737 F. 2d at 396.

issues were never explicity nor implicitly decided by the Ohio court. As this Court has indicated in numerous cases, absent proper presentation and adjudication below, the Court is without jurisdiction to review the decision by the Ohio court. This Court should dismiss this appeal since Appellant failed to properly and adequately present below the questions it is raising in this appeal.

### B. THIS APPEAL DOES NOT PRESENT A SUB-SUBSTANTIAL FEDERAL QUESTION

Cincinnati Bell is attempting to fashion a federal question from res judicata cloth by decorating it with a full faith and credit argument. Cincinnati Bell is correct in saying that some courts have treated the application of res judicata to a prior federal court decision as a federal question. Appellant is correct in contending that in the proper circumstances full faith and credit is a federal question. But neither principle, either separately or together, applies to the instant appeal. No federal question, therefore, is properly raised by Appellant under the two principles.

It is true that an administrative decision can be given res judicata effect. *United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); Superior's Brand Meats, Inc. v. Lindley,* 62 Ohio St. 2d 133 (1980). But authorities agree that res judicata applies to an administrative decision only when "the administrative agency is engaged in deciding specific legal claims or issues through a procedure *substantially similar to those employed by courts."* Restatement (Second) of Judgments § 83, at 268 (1983) (emphasis added). *See also United States v. Utah Construction and Mining Co.,* 384 U.S. 394, 421-22 (1966); *Superior's Brand Meats, Inc. v. Lindley,* 62 Ohio St. 2d 133, 136 (1980); K. Davis, *Administrative Law Treatise* § 21:3 (2d ed. 1979).

The FCC proceeding that resulted in the preemption decision was an administrative proceeding, which was legislative in nature. It was a rulemaking action by the FCC, without the accoutrements of a judicial proceeding such as a hearing, compulsory process, cross-examination of witnesses, and the

presentation of evidence.[8] The FCC styled the inquiry as a rulemaking proceeding. The Fourth Circuit Court of Appeals correctly labelled the FCC's action rulemaking, *Virginia State Corporation Commission,* 737 F.2d at 391, as did the Ohio Supreme Court, *Cincinnati Bell,* 12 Ohio St. 3d at 283. Without exception,[9] the cases cited by Appellant for its proposition that the Ohio Supreme Court was obligated to give res judicata effect to the Fourth Circuit decision involved the issue of whether a state court must give res judicata effect to a federal court contest in which the federal tribunal was asked to resolve "disputed issues of fact properly before it which the parties [had] had an adequate opportunity to litigate." *United States v. Utah Construction and Mining Co.,* 384 U.S. 394, 421-22 (1966). None of the cases cited by Appellant involved the question of affording res judicata effect to an administrative notice-and-comment rulemaking decision even remotely comparable to the FCC preemption decision. Given the uncontroverted fact that the FCC proceeding was not an adjudication and the authority that establishes that res judicata applies only to adjudications, the FCC's decision in the instant case is not entitled to res judicata effect.

The fact that the FCC preemption decision was reviewed by the Fourth Circuit does not transform the FCC's rulemaking/legislative proceeding into an adjudicatory proceeding. To suggest that because a court heard the appeal, th conflict becomes an adjudication is to engage in a game of semantics. The Fourth Circuit Court of Appeals only has authority to engage in the limited activity of judicial review. 47 U.S.C. § 402(a) and 28 U.S.C. § 2341 *et seq.* Its inquiry is limited to determining whether the FCC had the authority to take the challenged action, whether it followed the required pro-

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[8] *See Goldberg v. Kelly,* 397 U.S. 254 (1970), wherein the Court enumerated the constituent elements of an adjudication. CBT concedes that the preemption decision was legislative in nature at page 5 of its Jurisdictional Statement.

[9] Cincinnati Bell directs the Court's attention to the Ohio Supreme Court's decision in *Efros v. Nationwide Corp.,* 12 Ohio St. 3d 191 (1984), issued on the same day as the decision in question in the instant appeal. That case involved litigation with all of the elements of an adjudication. The applicability of res judicata was not at issue nor addressed by the court in that case.

cedures, and whether its action was arbitrary, capricious, or an abuse of discretion. *Springfield Television of Utah, Inc. v. FCC,* 710 F.2d 620, 623 (10th Cir. 1983); *Home Box Office, Inc. v. FCC,* 587 F.2d 1248, 1255-56 (D.C. Cir. 1978). The Fourth Circuit itself recognized such limitation, purporting to determine only what the FCC had intended to do in its January 6, 1983 preemption decision and whether the FCC's determination was reasonable in light of governing statutes and the record in the case. *Virginia State Corporation Commission,* 737 F.2d at 393. Fourth Circuit review has not changed the fact that at the "trial" level, trial-like procedures were not followed by the FCC. What was a rulemaking action, with notice and comment procedures, remains a rulemaking for purposes of determining the res judicata effect of the FCC's and Fourth Circuit's decisions as they relate to Ohio's effort to establish intrastate telecommunications rates for Appellant.

In further support of its res judicata argument, CBT, for the first time in this case, raises the notion of full faith and credit. Even if raised below, this concept is simply inapplicable in the instant case. The provision requires that full faith and credit be given in each *state* to the public acts, records, and judicial proceedings of every other *state.* The federal full faith and credit statute, 28 U.S.C. § 1738, enacted in 1790, went further than the constitutional clause in requiring that both state *and federal* courts give deference to state court decisions. *Migra v. Warren City School District Board of Education,* 52 U.S.L.W 4151 (January 23, 1984).

While this Court has suggested that the full faith and credit principle may require a state court to give deference to a federal court decision, that requirement applies when the federal court is hearing specific legal claims involving specific parties and a specific set of operative facts from which a cause of action arose and to which state or federal law was applied after full litigation of the claims. *See, e.g., Embry v. Palmer,* 107 U.S. 3 (1883). Without exception, the cases cited by Cincinnati Bell for its proposition that a state court owes full faith and credit to a federal court judgment involved federal courts

hearing such cases. In all but one case,[10] the federal courts were sitting under their diversity jurisdiction. In such a situation, it is arguably reasonable to apply the principle of full faith and credit given that the federal court is applying state law as if it were a state court. Cincinnati Bell cites no authority that supports the position that under the principle of full faith and credit, a state court owes deference to a federal court that has merely exercised its function of judicial review of federal administrative action. Full faith and credit is concerned with the distribution of power and the relationship among the states, not with the alleged preeminence of federal court decisions emanating from federal court review of federal administrative action. *See The Federalist,* Nos. 41 and 42 (J. Madison); C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 4468, at 650-51 (1981); *see generally* Degnan, *Federalized Res Judicata,* 85 Yale L.J. 741 (1976).

Linking the principles of res judicata and full faith and credit does not cure the defect of the inapplicability of either principle to the instant case. Res judicata is based on the value placed on judicial economy and the finality of judgments. Res judicata by itself is not a federal question. More importantly, even if it were, res judicata does not apply to the circumstances of the instant case. While full faith and credit could be a question for Supreme Court deliberation, neither was the principle raised below nor does it apply in the instant case.

## ARGUMENT IN SUPPORT OF MOTION TO AFFIRM

### A. THE OHIO SUPREME COURT PROPERLY APPLIED STATE LAW IN THIS CASE

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[10]In *Stoll v. Gottlieb,* 305 U.S. 165 (1938), the Illinois Supreme Court refused to give effect to a decision of the bankruptcy court sitting in Illinois because it believed that the decree in question went beyond the bankruptcy court's subject matter jurisdiction. The United States Supreme Court's application of res judicata in this case was confused, unexplained, and never discussed in subsequent cases. Degnan, *Federalized Res Judicata,* 85 Yale L.J. 741, 749 (1976).

Even if in the instant case res judicata were a federal question that might command this Court's attention, the Ohio Supreme Court has already addressed it and has properly disposed of it under state law res judicata principles. As Cincinnati Bell has pointed out, the fact that the court invoked state law to treat this issue creates no conflict with federal res judicata principles, because "[f]ederal res judicata law differs from Ohio law only in that the mutuality requirement has been relaxed in some circumstances." (Citation omitted.) Appellant's Jurisdictional Statement at 21.

As noted previously, the only res judicata issue before the Ohio court was whether it was required to give res judicata effect to the FCC's ru'emaking decision. *Cincinnati Bell,* 12 Ohio St. 3d at 283. The court found that while res judicata effect can be given to administrative decisions, it does not apply to legislation or rulemaking functions. *Id.* (citing *Superior's Brand Meats, Inc. v. Lindley,* 62 Ohio St. 2d 133 (1980) and *State Corporation Commission v. Wichita Gas Co.,* 290 U.S. 561 (1934). The court further stated that the FCC had styled its inquiry as a rulemaking proceeding and that no hearings were conducted, no expert testimony was elicited, and no participant was given the opportunity to cross-examine witnesses. The Ohio court properly concluded that the FCC preemption decision was legislative in nature, as opposed to adjudicative, and, therefore, principles of res judicata did not apply. *Id.* Cincinnati Bell's attempt, on appeal to this Court, to enhance its res judicata argument by invoking constitutional support simply does not change the fact that res judicata does not apply to an administrative rulemaking decision.

Even if res judicata were a federal question, this Court has held that where both federal and state decisions have been decided by the state court, it is "a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even when those judgments also decide federal questions." *Henry v. Mississippi,* 379 U.S. 443, 446 (1965).

## B. THE DECISION BELOW IS SIGNIFICANT ONLY FOR STATE LAW PURPOSES

Cincinnati Bell suggests at page 27 of its Jurisdictional Statement four factors that it claims attest to the significance of its appeal. These four factors do not correctly characterize the effect of allowing the Ohio Supreme Court decision to stand. Since the Ohio Supreme Court merely applied state law properly to state law issues, its decision should be affirmed.

Appellant's assertion that there exists a direct conflict between the Ohio Supreme Court's decision and the decisions of the Fourth and Eighth circuit courts of appeals is incorrect. The decision of the Ohio Supreme Court rests on its rejection of the only issue properly before it, the res judicata effect of the FCC decision, and on its application of state ratemaking law. The Fourth Circuit's decision, never properly raised before the Ohio Supreme Court, is the product of limited judicial review addressing the authority of the FCC under the Communications Act of 1934. *Virginia State Corporation Commission,* 737 F. 2d at 393. The Ohio court did not base its decision on a review of the FCC authority, something the court admitted it had no jurisdiction to do.

The Eighth Circuit Court of Appeals was reviewing a federal district court decision, in which the district court determined that the FCC preemption decision was invalid. The Eighth Circuit was presented with the question of the district court's jurisdiction to consider the validity of an FCC decision under the Communications Act. *Southwestern Bell Telephone Co. v. Arkansas Public Service Commission,* 738 F. 2d 901, 903 (8th Cir. 1984). That issue simply was not an issue before the Ohio court. Clearly, there is no conflict between the Ohio and federal court decisions.

As its third basis for the significance of this appeal, Cincinnati Bell suggests "the importance of the issues in this case to the telecommunications industry." The Ohio court applied state law to an intrastate request for an increase in rates. To the extent that the FCC preemption decision has an impact on the industry, this Court's concern should be directed to the appeals of the Eighth Circuit decision, *South-*

*western Bell Telephone Co.*, 53 U.S.L.W. 3290 (U.S. petition for cert. filed Sept. 26, 1984), and of the Fourth Circuit decision, in which the questions associated with the Communications Act and the FCC's authority were at least raised and addressed. It should also be noted that the FCC prescription of depreciation rates for intrastate services is a question that is not new and urgent but has been the subject of discussion during the fifty years of telephone regulation. *See Re Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies,* 89 FCC 2d 1094, 1096-1108 (April 27, 1982).

As a final point, CBT claims to be in a "precarious position" because of a purported conflict CBT is now subject to as a result of the Ohio Supreme Court and FCC decisions. At no point in this case has Cincinnati Bell ever established just what its "precarious position" happens to be. Furthermore, as even the Fourth Circuit Court of Appeals noted, members of the telecommunications industry have historically kept separate sets of books for various purposes, for example, for interstate ratemaking, intrastate ratemaking and tax purposes. Finally as that court stated, "[T]he instant appeal raises no question of actual physical impossibility of complying with dual federal and state regulation. . . ." 737 F. 2d at 396.

In short, not one of Appellant's horribles presents a significant factor that raises the level of importance of this appeal to that which is worthy of this Court's consideration. They do not change the fact that the Ohio Supreme Court properly applied the principles of res judicata to the facts presented. This Court should affirm that decision.

## CONCLUSION

This Court should sustain Appellee's Motion to Dismiss this appeal. Appellant failed to timely present for review the same questions it would now have this Court review. In addition, the questions presented by Appellant for review by this Court are not substantial federal questions.

The decision below rests entirely on the application of state law principles which do not conflict with federal law or the concept of federalism. In addition, since that decision did not address principles of federal law or the concept of federalism, it does not conflict with any federal court determination with respect to the preemption authority of the FCC under the Communications Act. Finally, the decision does not require Appellant to perform its obligations under state ratemaking authority in a manner that makes impossible its compliance with federal law. For these reasons, this Court should sustain Appellee's Motion to Affirm the decision of the Ohio Supreme Court.

Respectfully submitted,

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